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Idaho Supreme Court
Melanie Gagnepain, Clerk of the Court
By: Melanie Gagnepain, Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

SUPREME COURT DOCKET NO. 50482-2023
County of Latah No. CR29-22-2805

In Re: Petition for Writ of Mandamus or Writ of Prohibition.

THE ASSOCIATED PRESS; RADIO TELEVISION DIGITAL NEWS ASSOCIATION; SINCLAIR MEDIA OF BOISE, LLC/KBOI-TV (BOISE); THE MCCLATCHY COMPANY, LLC; STATES NEWSROOM dba IDAHO CAPITAL SUN; THE SEATTLE TIMES; TEGNA INC./KREM (SPOKANE), KTVB (BOISE) AND KING (SEATTLE); EASTIDAHONEWS.COM; THE LEWISTON TRIBUNE; WASHINGTON STATE ASSOCIATION OF BROADCASTERS; ADAMS PUBLISHING GROUP dba POST REGISTER; IDAHO PRESS CLUB; IDAHO EDUCATION NEWS; KXLY-TV/4 NEWS NOW AND KAPP/KVEW-TV—MORGAN MURPHY MEDIA KXLY-TV/4 NEWS NOW; SCRIPPS MEDIA, INC., dba KIVI-TV, a Delaware corporation; BOISE STATE PUBLIC RADIO; THE TIMES-NEWS; THE SPOKESMAN- REVIEW/COWLES COMPANY; COEUR D'ALENE PRESS; THE NEW YORK TIMES COMPANY; DAY365 dba BOISEDEV; LAWNEWZ, INC.; SCRIPPS MEDIA, INC., a Delaware corporation; ABC, INC.; WP COMPANY LLC, dba THE WASHINGTON POST; SOCIETY OF PROFESSIONAL JOURNALISTS,

Petitioners,

vs.

SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, COUNTY OF LATAH; HONORABLE MEGAN E. MARSHALL, MAGISTRATE JUDGE,

Respondents,

and

BRYAN C. KOHBERGER and STATE OF IDAHO, LATAH COUNTY PROSECUTOR,

Intervenor-
Respondents.

INTERVENOR-RESPONDENT BRYAN C. KOHBERGER'S BRIEF IN RESPONSE TO THE PETITION FOR A WRIT OF MANDAMUS OR A WRIT OF PROHIBITION

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STATEMENT OF THE CASE

A. Nature of the Case

This is a petition by various media companies to this Court to grant a writ that would dissolve the amended nondissemination order entered in *State v. Kohberger*. The media's main contention is that the Magistrate Court (the Petitioner refers to this as the District Court) should have had to hold a hearing and taken evidence to enter the amended nondissemination order. Bryan Kohberger appears now to argue on his own behalf that no such hearing is required to enter an order that merely reflects longstanding rules of professional conduct, and that the no comment order in this matter is appropriate given the level of media scrutiny.

B. Course of Proceedings & Statement of Facts

On December 29, 2022, the State filed four charges of First Degree Murder against Bryan Kohberger. On December 30, 2022, attorneys made a limited appearance on his behalf. On January 3, 2023, the State and Mr. Kohberger agreed to the entry of a nondissemination order. That Order stated:

> The Court, by stipulation of the parties, enter its Order as follows:
>
> IT IS HEREBY ORDERED that the parties to the above entitled action, including investigators law enforcement personnel, attorneys, and agents of the prosecuting attorney or defense attorney, are prohibited from making extrajudicial statements, written or oral, concerning this case, other than a quotation from or reference to, without comment, the public records of the case.
>
> This order specifically prohibits any statement, which a reasonable person would expect to be disseminated by means of public communication that relates to the following:
>
> 1. Evidence regarding the occurrences or transactions involved in this case;
> 2. The character, credibility, or criminal record of a party;
> 3. The performance or results of any exminations [sic] or tests or the refusal or failure of a party to submit to such tests or examinations;

4. Any opinion as to the merits of the case or the claims or defense of a party;

5. Any other matter reasonably likely to interfere with a fair trial of this case, such as, but not limited to, the existence or contents of any confession, admission, or statement give [sic] by the Defendant, the possibility of a plea of guilty to the charged offense or a lesser offense, or any opinion as to the Defendant's guilt or innocence.[1]

IT IS FURTHER ORDERED that no person covered by this order shall avoid its proscriptions by actions that indirectly, but deliberately, cause a violation of this order.

IT IS FURTHER ORDERED that this order, and all provisions thereof, shall remain in full force and effect throughout these proceedings, until such time as a verdict has been returned, unless modified by this court.

On January 13, 2023, the Magistrate Court held a meeting via zoom with the parties under seal. As a result of that meeting, the Court entered an Amended Nondissemination Order on January 18, 2023. This Order contained a preface indicating the law permits the entry of such an order, that the parties stipulated to its entry, and added the attorneys for witnesses, victims, and victims' families to those bound by the order. Additionally, it added a first section that prohibited all attorneys and their agents from "making extrajudicial statements (written or oral) concerning this case, except, without additional comment, a quotation from or reference to the official public record of the case." The original order remained as a part 2.

[1] This language largely mirrors I.R.P.C. 3.6 cmt. 5, which states:
[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:
(1) The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
(2) In a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
(3) The performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
(4) Any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
(5) Information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
(6) The fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

On February 3, 2023, an attorney for a victims' family filed a Motion to Appeal, Amend, and/or Clarify Amended Nondissemination Order. In his Memorandum in Support of Motion for Appeal and/or Clarification of Amended Nondissemination Order, the attorney indicated he had not stipulated to the entry of the order. The crux of his Motion was that the order should not apply to him at all.

On February 6, 2023, the Petitioners filed their request for a writ that would dissolve the nondissemination order (which the Petitioners refer to as a "gag" order).

On February 28, 2023, the magistrate court unsealed a memorandum with redactions of the January 13, 2023, meeting.

ISSUES PRESENTED

I. Whether the Petitioners should have filed a motion to amend the nondissemination order in the Magistrate Court before seeking this relief.

II. Whether the Magistrate Court was required to hold a hearing or make findings before entering a nondissemination order involving purely attorneys, their agents and law enforcement, and that largely restates I.R.P.C. 3.6 cmt. 5.

III. Whether the Magistrate Court was required to hold a hearing or make findings before entering a no comment order involving purely attorneys, their agents and law enforcement.

ARGUMENT

I.

A. Introduction

At issue in the petition is whether the magistrate erred by not holding a hearing and applied the wrong standard when granting the amended nondissemination order. This is not an appropriate order for a writ of mandamus or a writ of prohibition. The Petitioners can and have just recently in other cases appeared at the trial court level and made their arguments in the proper forum. There is nothing in the record to show that they have been thwarted attempting to be heard by the Magistrate Court. This Court should not permit the Petitioners to turn it into the court of first resort in First Amendment litigation.

B. Standard of Review

> A writ of mandate may be issued "to any inferior tribunal ... to compel the admission of a party to the use and the enjoyment of a right or office for which he is entitled, and from which he is unlawfully precluded by such inferior tribunal. ..." I.C. § 7-302. The writ is only available in limited circumstances "where there is not a plain, speedy and adequate remedy in the ordinary course of law. It must be issued upon affidavit, on the application of the party beneficially interested." I.C. § 7-303. A writ of mandamus is not a writ of right, and this Court's choice to issue a writ is discretionary when compelled by urgent necessity. *Regan v. Denney*, 165 Idaho 15, 20, 437 P.3d 15, 20 (2019).
>
> The writ of prohibition is substantially similar in both scope and limitation: "It may be issued by the [S]upreme [C]ourt or any district court to an inferior tribunal, or to a corporation, board or person in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It is issued upon affidavit on the application of the person beneficially interested." I.C. § 7-402. "The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." I.C. § 7-401.
>
> "Moreover, it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." *Kerr v. U.S. Dist. Ct. for N. Dist. of California*, 426 U.S. 394, 403, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976) (citing *Schlagenhauf v. Holder*, 379 U.S. 104, 112 n. 8, 85 S.Ct. 234, 13 L.Ed.2d 152, (1964); *Parr v. United States*, 351 U.S. 513, 520, 76 S.Ct. 912, 100 L.Ed. 1377 (1956)).

Hepworth Holzer, LLP v. Fourth Judicial District of State, 169 Idaho 387, 393 (2021).

C. The extraordinary writ of mandamus is inappropriate in this case where the media has the ability to move to amend the nondissemination order at the trial court level.

The Petitioners in this matter have argued that there is no way for them to seek relief from the nondissemination order because there is no way to intervene. However, in *State v. Daybell*, Fremont County Case No. 22-21-1624 (2022), many of the same media corporations (The Associated Press; Sinclair Broadcast Group (KBOI); The McClatchy Company, LLC; KTVB; KXLY; KIVI-TV; ABC, INC. all appear to be in both cases, there are possibly more media corporations that took part in both cases, given that the way the media groups are named seems to differ slightly) that are named Petitioners in this matter filed an Interested Persons' Response to Defendant's Motion to Clarify Media in the Courtroom. In its Memorandum Decision and Order Prohibiting Video and Photographic Coverage, the District Court in *Daybell* indicated that the media had been permitted to participate in the filings and subsequently denied the media's request.

The petition makes no mention of this. Rather, it indicates that intervention in a criminal case is not provided for by rule. Petitioner's Brief at 5. While true, that hardly prevents the Petitioners from filing a motion as interested parties before the Magistrate Court in the case below just as they have in other cases. Though *Cowles Pub. Co. v. Magistrate Court of the First Judicial Dist. Of State, County of Kootenai*, 118 Idaho 753 (1990), never explicitly gave the media a mechanism to appear and argue- they did so anyway in *State v. Samuel*, Kootenai County Case No. CR-14-5178 (2014) (Motion of KHQ, Inc. to Intervene for Limited Purpose of Determining Public Access to Proceedings and Records). The courts of this state have never been stingy about permitting the media to argue on behalf of public access.

The media also claims it has not had the opportunity to lodge a written or oral objection. There is no indication in the record that they ever tried in the case below. It is rather odd to claim a

lack of opportunity to challenge an order that has already been amended once and can certainly be amended again.

As will be examined below- what the media really seeks here is a procedural victory, knowing full well it cannot win on the merits of any test, given the pervasive and grotesquely twisted nature of media coverage that has occurred thus far. The media, by never even attempting to appear before the Magistrate Court, provides this court with no record of what it claims has gone wrong. Thus, it wishes to argue that there had to be a record of what has gone right. But the questions of whether the Magistrate Court made an error in entering these orders is far from the appropriate target for a writ of mandamus. This is simply an appeal from an order the media chose not to take part in.

The media cites to *In re The Wall Street Journal*, 601 Fed.Appx. 215 (2015), to support its leapfrogging into this Court's original jurisdiction. That opinion begins:

> This matter comes before us on a Petition for Writ of Mandamus filed by a group of news organizations and a nonprofit, all of whom **the United States District Court for the Southern District of West Virginia permitted to intervene in a pending criminal case.** [emphasis added] Having been largely rebuffed by the district court, Petitioners seek vacatur of a sealing and gag order which prohibits: (1) public access to most documents filed in the case and (2) the parties, their counsel, potential trial participants, court personnel, and others from discussing the case with any member of the media.

Id. at 217. Even if this Court were to agree with the federal courts that a writ of mandamus is the appropriate vehicle because of the speed at which it operates- the federal courts permit the media to make its case below.

This Court should be extremely wary of rewarding the refusal to partake in the ordinary course of legal proceedings by granting the extraordinary writ.

D. <u>The extraordinary write of prohibition is inappropriate in this case because the media is not requesting the magistrate refrain from something.</u>

Writs of prohibition are permitted to prohibit an officer from doing something. *See*, I.C. § 7-401; Simko, *Mandamus and Prohibition in Idaho*, 4 Idaho L. Rev. 1, pp. 17-18 (1967). The Petitioners are not trying to prevent any action in the case below. Thus this writ should be denied.

II.

A. Introduction

The Petitioners have claimed that the amended nondissemination order in this matter violates the First Amendment but focused their argument on what standard applies to a nondissemination order. The Petitioners then erroneously treat every case alike and argue in favor of strict scrutiny and claim the order in this case would not survive any scrutiny- even as they accept that part of this order does nothing that the rules of professional ethics do not already do. Petitioner's Brief at 10. The Petitioners have failed to show any error or a right to any remedy.

B. The legal standard for nondissemination orders for attorneys and their agents is reasonableness.

As noted above- this is the crux of the Petitioner's case. The Petitioner's claim that strict scrutiny is appropriate for a nondissemination order for attorneys and their agents has no basis in law.

Instead, the Petitioner's cherry pick quotations from cases that pointedly do not require strict scrutiny. In *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966), which the Petitioners cite for the proposition that they are the "handmaidens" of justice, actually set the standard for the entry of nondissemination orders as whether "there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial". A much more apt quotation from *Sheppard* would have been:

> Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to

> information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

Id. In *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563 (1976), the Court noted the attractiveness of nondissemination orders for counsel and the police. In *Application of Dow Jones & Co.,* 842 F.2d 603, 610 (1988), the Court found that:

> [t]o decide whether the pretrial publicity justified the order, the standard by which to measure justification is whether there is a "reasonable likelihood" that pretrial publicity will prejudice a fair trial. *See* *Sheppard v. Maxwell*, 384 U.S. at 363, 86 S.Ct. at 1522. The Local Criminal Rules for the Southern District of New York concerning extrajudicial speech also adopt a "reasonable likelihood" standard. As a direct result of the "Free Press—Fair Trial Report" of 1968, *reprinted in* 45 F.R.D. 391, 404 (1968), Local Rule 7(a) prohibits counsel from releasing any information "if there is a reasonable likelihood that such dissemination will interfere with a fair trial...." S.D.N.Y.Crim.R. 7(a). The nature and extent of the pretrial news coverage in this case must be examined to see if the pretrial publicity in the light of that standard posed such a threat to defendants' Sixth Amendment rights as to justify the July 10 restraining order.

It is perhaps difficult to understand, given the fact that there is Supreme Court authority directly on point, why there is confusion on this legal standard. However, later in the media's briefing there are some cases that flesh out this issue. The media cites to *Radio & Television News Ass'n of S. Cal. v. U.S. Dist. Court for Cent. Dist. Cal.*, 781 F.2d 1443 (9th Cir. 1986) (hereinafter *Radio & Television*), *News-J.Corp v. Foxman,* 939 F.2d 1499 (11th Cir. 1991), and Kevin F. O'Malley, *et al.*, *Standards relation to fair trial and free press*, 1 Fed. Jury Prac. & Instr. § 2:4 (6th ed. 2023). In *Radio & Television*, the 9th Circuit finds that the order in question merely needed to be reasonable. *Id.* at 1447. In *Standards*, the authors note that after *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), it is clear that regulations of attorney speech are permissible. And in *News-J.Corp*, decided just a few months after *Gentile*, the Court abstained from providing the media a federal hearing but noted the necessity of the state having given them that opportunity. 939 F.2d at 1516.

On the other hand- the media cites to *Application of Dow Jones & Co.,* and George L. Blum, *et al.*, *Court's power to impose gag order to assure fair trial*, 75 Am. Jur. 2d Trial § 135 (2023), which do require rigorous factual findings. However, *Application of Dow Jones & Co.* was decided prior to *Gentile*, so its value is dubious. American Jurisprudence is a more complex situation. For whatever reason- the authors chose to rely on *U.S. v. McGregor*, 838 F.Supp.2d 1256 (M.D. Ala. 2012). The district court in *McGregor* does adopt an approach with a number of requirements- but it does so as a district court. It also does so based on its analysis of prior restraints in a prior case- *U.S. v. Carmichael*, 326 F.Supp.2d 1267 (M.D. Ala. 2004). In that case- the district court cited to several cases on prior restraint for parties and attorneys that show the same issues the Petitioners have in making this argument now. *See id.* at 1293-94 (*citing U.S. v. Ford*, 830 F.2d 596 (6th Cir. 1987) (decided prior to *Gentile*); *U.S. v. Brown*, 218 F.3d 415 (5th Cir. 2000) (finding more than a reasonable likelihood standard is inappropriate after *Gentile*). However, in *McGregor*, the district court found that *Gentile* changed the test for attorneys- the standard is reasonableness. Although the Court in *McGregor* went on to deny the government's requested gag order- it chose to order the parties to follow the local ethical rules. *Id.* at 1267.

The Petitioners point to a single case that applies strict scrutiny in this setting after *Gentile* - *People v. Sledge*, 879 N.W.2d 884 (Ct.App.Mich. 2015). However, that that court clearly erred in relying on *CBS Inc. v. Young*, 552 F.2d 234 (6th Cir.1975) for its standard. It is easy to see why *CBS Inc.* is of no help to the petitioners- it was a civil case in which no one had any Sixth Amendment rights to be balanced. (It also occurred pre-*Gentile*).

This Court should simply apply the standards set out in *Sheppard* and *Gentile.* The Petitioners' attempt at a rebalancing First and Sixth Amendment concerns in this context would necessarily require this Court to overrule the Supreme Court of the United States. Similarly- the media's argument that the Idaho Constitution can draw a different line must fail- states cannot

provide less protection than the federal constitution- and to rebalance one right against another necessarily requires this Court to undercut one of those rights. *See State v. Donato*, 135 Idaho 469, 471 (2001).

C. The part of the amended nondissemination order that is merely a restatement of I.R.P.C. 3.6 cmt. 5 did not require specific findings or a hearing before it was entered.

As to the second part of the Amended Nondissemination Order, the question the media's argument raises is- what findings are required, if any, for a court to enter an order enforcing the Idaho Rules of Professional Ethics? Based on this Court's rulings, no such findings are required. In *Litser Frost Injury Lawyers, PLLC v. Idaho Injury law Group, PLLC*, 171 Idaho 1 (2022), this Court not only found that an attorney had violated the rules of professional ethics, but remanded for the district court to devise a sanction. This Court found that determining sanctions for conflicts of interest was "precisely the kind of ethical question that this Court, and trial courts, may properly address." *Id.* at 23 (*citing Hepworth Holzer, LLP*, 169 Idaho at 394). In *Schiermeier v. State*, --- Idaho ---, 521 P.3d 699, 711-12 (2022), this Court issued a written public warning in its decision to attorneys violating I.R.P.C. 8.2 and 8.4. Thus, this Court has held that courts have the inherent power to sanction attorney misconduct. The only case that seems to stand for the proposition that they cannot is *Kosmann v. Dinius*, 165 Idaho 375, 385 (2019), wherein this Court found that the professional rules should not be used by attorneys as weapons and that the district court appropriately left the issue of a violation of I.R.C.P. 4.2 to the State Bar. This Court clearly delineates between attorney misconduct reported by a party from that which a judge personally experiences. Although media relations are extrajudicial- a judge is capable of being exposed to the same misinformation.

Thus, this Court's precedents are clear- the Rules of Professional Conduct are active limitations in this matter on the attorneys and their agents. Thus, the magistrate court's portion of

the Nondissemination Order that simply restated the rule was nothing more than an admonishment to the attorneys and their agents that they must abide by I.R.P.C. 3.6. Even without the Order, the magistrate would have been able to sanction parties for violating those rules. This is not a case where the attorneys seek to use the rules as a weapon against one another. It is a case where a young man is on trial for his life. There was nothing inappropriate about the Magistrate Court reminding the attorneys involved of their ethical obligations.

D. The part of the amended nondissemination order that prohibits any statement concerning the case below is not appropriate for mandamus relief.

The first part of the amended nondissemination order prohibits essentially any speech concerning the case, and is sometimes termed a "no comment order." Bennett L. Gershman, *Remedies – Judicial Control of Extra-Judicial Statements*, Prosecutorial Misconduct § 6:24 (2d ed. 2022). Here- the issue is with an order whose entry indeed must be reasonable. The question then is whether the Court properly entered the order and applied the governing law.

The media insists that the record does not show that the magistrate conducted a hearing before issuing the order. This Court is aware that the magistrate had a duty pursuant to the Idaho Code of Judicial Conduct Rule 2.15 to take appropriate action where attorneys engage in conduct in violation of the Rules of Professional Conduct. Moreover, it has a duty to safeguard Mr. Kohberger's right to a fair trial. *Sheppard*, 384 U.S. at 358. Thus, if the magistrate was aware of conduct concerning the behavior of attorneys in this matter, it had a duty to implement an order to correct misbehavior.

In terms of understanding the law to be applied- the amended dissemination order states that it is based on what the Magistrate Court believed to be necessary given the media coverage of the case and the need to preserve the right to a fair trial. The Magistrate Court references *Sheppard v. Maxwell, Nebraska Press Ass'n v. Stuart, Gentile v. State Bar of Nevada,* the ABA STANDARDS FOR

CRIMINAL JUSTICE FAIR TRIAL AND PUBLIC DISCLOSURE (4th ed. 2016) and IRPC Rule 3.6. As argued above- *Sheppard* and *Gentile* set out the proper considerations for a court considering an ad hoc attorney speech rule for a case. All that remains is its application.

The media seems to argue that the Magistrate Court should have included a least a summary of the news stories that caused it to deem the no comment order necessary. If this were an appeal, it would be tempting to agree. However- this is a Petition for a Writ of Mandamus. This matter is only two months old. As noted in the first section of this brief, the media has the ability to request the dissolution of the order or its amendment at the magistrate level. In this case, the record makes it clear that the Magistrate Court was responding, as it is required to do for purposes of due process and the judicial canons, to the media coverage of this case. *See*, *Sheppard*, 384 U.S. at 358; ICJC R. 2.15. Even if the Magistrate Court went too far, that is something that is best addressed at the trial level. This Court should not simply dissolve the protections put in place for Mr. Kohberger on this record.

CONCLUSION

This Court should find that the Petitioners failed to raise their issues before the Magistrate Court in the first instance and this Petition is premature. Further, this Court should find that the second part of the Amended Nondissemination Order in this matter merely echoes the ethical rules already binding on the attorneys and their agents and required no additional consideration or findings to be entered. The Petitioner's Petition should be DENIED.

DATED this ___2____ day of March, 2023.

ANNE C. TAYLOR, PUBLIC DEFENDER
KOOTENAI COUNTY PUBLIC DEFENDER

BY: 

JAY WESTON LOGSDON
CHIEF DEPUTY LITIGATION
ASSIGNED ATTORNEY

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served as indicated below on the ___2____ day of March, 2023 addressed to:

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